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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-205021

DATE: June 8, 1982

MATTER OF: Saudi Maintenance Company, Ltd.

**DIGEST:**

1. Since protest of medical services contract--awarded by the Army Corps of Engineers, but funded by Saudia Arabia--was conducted pursuant to the Defense Acquisition Regulation, GAO may review the protest.
2. GAO finds that there was no Army prequalification requirement regarding a firm's capability to perform required medical services in Saudi Arabia. By agreement, however, the Saudi Arabian Government had the right to approve the list of firms to be sent a solicitation. Nevertheless, whether the awardee was ever formally placed on the list is academic since the Saudi Arabian Government sent the awardee a copy of the RFP.
3. GAO finds no merit in the protester's contention that the Army was biased against the protester because (1) while the Army may have discouraged the protester from proposing on a joint-venture basis (instead of a prime contractor-subcontractor basis), there is no indication that the protester was prejudiced thereby, and (2) the other five points (relating to the scoring of initial proposals, the scoring of the protester's experience, the evaluators' qualifications, and the closeness of the contract price to the Government cost estimate) raised by the protester do not constitute a persuasive basis to establish a predisposed or preferential attitude by the Army detrimental to the protester's interests.
4. GAO concludes that the protester has not presented a sufficient showing to cast doubt on the integrity of the written record, which

clearly indicates that the Army communicated to the protester the evaluated weaknesses in the protester's initial proposal especially concerning the role and commitment of the protester's proposed subcontractor.

5. To the extent the protester is now protesting that the Army improperly denied in July 1981 the protester's request for additional time to assemble representatives of the protester's proposed subcontractor for procurement negotiations, the protest is untimely. See 4 C.F.R. § 20.2(b)(2) (1981).
6. GAO concludes that the Government cost estimate was based on information regarding the scope of the work disclosed in the RFP and discussed with the protester. Consequently, the Government estimate was a proper element to be used in evaluating the proposals.

Saudi Maintenance Company, Ltd., protests the award of a contract to Saudi Medical Services, Ltd., under request for proposals (RFP) No. DACA93-81-R-0009 issued by the Army Corps of Engineers on behalf of the Saudi Arabian Government for medical services for Army personnel, contractor personnel, and Saudi Arabian military and civilian personnel at Al Batin, Saudi Arabia.

The protester contends that the Army did not treat the protester fairly by failing to approve its request to form a joint venture, inadequately disclosing weaknesses in its proposal during discussions, and selecting the awardee based on its offer of unsolicited extras. The Army urges dismissal of the protest on the ground that this is a foreign military sale outside the scope of GAO's concern; alternatively, the Army contends that the protester was treated fairly. We conclude that this matter is within the scope of our concern, but we find that the protest is without merit.

Regarding dismissal, the Army explains that the procurement is governed by a country-to-country agreement entitled the Engineers Assistance Agreement of 1965 rather than a "Letter of Offer and Acceptance" commonly used for foreign military sales under the Arms Export Control Act.

The Army states that funding for the procurement is provided in advance by the Saudi Arabian Government and that a Treasury Trust Fund account is used only to control program expenditures. In these circumstances, the Army contracting officer expresses concern over potential difficulties arising from a GAO recommendation for corrective action. Further, the Army cites our decision in Mandex Incorporated, B-204415, October 13, 1981, 81-2 CPD 303, as precedent for dismissing this protest.

Our decision in Procurements Involving Foreign Military Sales, 58 Comp. Gen. 81 (1978), 78-2 CPD 349, announced our intention to review, upon request of prospective contractors and other interested parties, the propriety of awards and proposed awards made by Department of Defense personnel acting under authority of the Arms Export Control Act (formerly the Foreign Military Sales Act), 22 U.S.C. § 2751, et seq. (1976). This statutory program involves major foreign military sales (for example, the instant procurement involves a contract in the amount of \$113,264,874), conducted by the Department of Defense pursuant to established regulations, requiring competitive bidding procedures. We pointed out, at 58 Comp. Gen. 81, 88, that the Defense Acquisition Regulation (DAR) is expressly applicable to procurements of this type conducted by the Department of Defense and, although the DAR specifically permitted sole-source contracting at the request of the foreign government, the overall applicability of DAR's provisions governing Department of Defense direct procurements provided uniform standards for our reviews.

Here, the instant matter involves a foreign military sale conducted pursuant to the DAR; thus, we may review the Army's action from the standpoint of compliance with the competitive bidding requirements imposed by DAR.

Finally, the Mandex decision is not precedent for dismissal because there we were persuaded by the Department of the Treasury that we were dealing with deposit fund accounts which, unlike trust fund accounts, were not the subject of legislation and were not established for a public purpose or public trust. However, we are reconsidering the rationale of the Mandex decision in response to a congressional request.

Second, the protester contends that the Army discouraged the protester from submitting a proposal as a joint venturer with Fairview Hospitals International (Fairview) but when, during discussions, the awardee asked to propose based on using a subcontractor, which, after award, would become a joint venturer, the Army asked the Saudi Arabian Government whether such a proposal would be permissible. The protester concludes that this alleged unequal treatment demonstrates the Army's improper bias toward the award.

In response, the Army explains that, by agreement, the Saudi Arabian Government has the right to exclude any firm from the competition. The Army's procedure is to prepare a list of firms to be sent an RFP; the list is reviewed by the Saudi Arabian Government, which makes additions or deletions. The Army initially advised the protester that the protester was approved but that its proposal would "not be accepted unless it [was] submitted in the [protester's] name"; however, during negotiations, the Army insists that an Army negotiator asked the protester if it would "consider an award [to it] with a subsequent novation assigning the contract to [a joint venture]" consisting of the protester and Fairview.

We note that the protester does not state how it was prejudiced by the Army's discouragement of the possible joint venture. We also note that Fairview was one of the protester's proposed subcontractors. Thus, since the protester had the opportunity to propose the use of Fairview to the extent that the protester desired and since the record contains no indication of actual prejudice to the protester's competitive position by the Army's action, we have no basis to conclude that the Army's action demonstrates improper bias toward the awardee.

Third, the protester contends that, during the August 3, 1981, discussions, the Army failed to request information from the protester to clarify the relationship between the protester and Fairview and that the Army had previously turned down its request for additional time so as to allow Fairview's representatives to attend the discussions. The protester believes that the lack of a final subcontract between Fairview and the protester was

Thus, although the Saudi Arabian Government could restrict competition for the medical services to certain firms and although the procurement statutes are not directly applicable, we will review the protest on the merits as announced in 58 Comp. Gen. 81, supra.

Regarding the merits of the protest, the protester first contends that, under the Army's ground rules for the procurement, all offerors had to be prequalified to be eligible to submit a proposal; the protester asserts that such prequalification referred to the firm's capability to perform and that evidence of prequalification was inclusion on an approved bidders' list. The protester states that the awardee was not on the list dated May 11, 1981, and there is no indication that the awardee was ever added to the list. The protester concludes that this is evidence of the Army's preferential treatment favoring the awardee.

The Army explains that there was no Army prequalification requirement regarding the qualifications or capabilities of any firm for this procurement since it was for services and not construction; however, pursuant to the Engineer Assistance Agreement, the list of prospective offerors, including the protester, was approved by the Saudi Arabian Government.

In fact, there was no Army eligibility requirement or prequalification ground rule regarding a firm's capability to perform, notwithstanding that the protester received an invitation from the Army to submit a proposal with the notation that the protester had been prequalified. Nevertheless, the RFP reasonably informed offerors that the awardee would be selected on the basis of proposal merit, not on any prequalification scheme. Further, whether the awardee's name was even added to the approved list of offerors seems academic since, as the protester points out, the Saudi Arabian Government sent the awardee a copy of the RFP, which action appears to be tantamount to listing on the approved list. Thus, this aspect of the protest is without merit.

the basis for the Army's determination that the protester lacked adequate experience. On the other hand, the protester states that the awardee is also inexperienced in this type of work but, without a final agreement, the Army determined that the awardee's proposed subcontractor had adequate experience and a substantial role. In this regard, the protester states that the nature and extent of Fairview's role was set forth in the proposal and that it was not aware that the role of Fairview posed a critical problem.

In response, the Army explains that Fairview is a well-recognized health care provider with significant experience and substantial expertise. However, the Army explains that it was concerned about Fairview's role as the protester's subcontractor and Fairview's commitment to the project. Regarding Fairview's role, the Army reports that the protester's proposal indicated that, during the 2-month phase-in period, Fairview would provide staffing assistance in developing policies and procedures for the hospital and related medical services; thereafter, Fairview would provide a semiannual review of the facilities and "little else." Regarding Fairview's commitment, the Army states that the protester was asked to provide a copy of its agreement with Fairview and the Army noted that Fairview's representatives did not attend the discussions. In sum, the Army contends, based on minutes of the discussions with the protester, that the protester was on notice that without a more substantial role for Fairview in staffing, management, and operations, the protester's proposal was unacceptable. The Army concludes that the protester's best and final offer did not adequately respond to the Army's concerns.

In our view, the Army's primary problem with the protester's proposal was the degree of Fairview's involvement in the project; Fairview's commitment--as confirmed by Fairview's agreement with the protester--was a secondary problem. Here, we must decide between the Army's position that its concern over Fairview's role and commitment was communicated to the protester and the protester's position that it was not. The record contains minutes of the discussions supporting the Army's contention and the protester's statement that the minutes are incorrect. In the circumstances, we conclude that the protester has not persuaded us that there is reason to doubt the integrity

of the written record. See Cubic Defense Systems, division of Cubic Corporation, B-203597, December 24, 1981, 81-2 CPD 493. Accordingly, we deny this aspect of the protest.

Moreover, to the extent the protester is now protesting the Army's denial of the protester's request for additional time to assemble Fairview's representatives so that they could attend the August 3 discussions, the protest is untimely. See 4 C.F.R. § 21.2(b)(2) (1981).

Fourth, the protester contends, in its initial letter of protest, that the Army selected the awardee based on unspecified, unsolicited "extras," outside the scope of work of the RFP. In response, the Army reports that the awardee proposed no extras and that the memorandum recommending selection of the awardee mentioned no extras. Instead, the Army states that the awardee was selected because its proposal was rated, in accord with the RFP's evaluation scheme, as being substantially better than the other proposals; moreover, the awardee's proposed costs were near the Government estimate.

In reply, the protester raises for the first time these specific objections, based on its view that the Government estimate is overstated: (1) staffing for 100 beds is not justified because historical data indicates average daily usage of about 24 beds; (2) actual usage data does not indicate that the need for staffing for 130 beds (when the additional 30-bed hospital wing is completed) would remain constant over the contract period; (3) the RFP did not mention a requirement for supplying 50 trailer homes to meet housing needs, as the Army's cost estimate indicates will be needed, and providing trailers is not practical because there is no room inside the camp and the leadtime necessary to install trailers is substantial; (4) there is no basis to justify 54 new vehicles because necessary onsite transportation is provided by bus; (5) medical supplies should not average \$200,000 per month, as the Government estimates, because the estimate is based on supplies in stock and not supplies actually used; and (6) the estimate is based on salary rates for Western nationalities for almost every position; whereas, the RFP permits use of non-Western nationalities (at lower salary rates) for most positions. From these comments, the protester concludes that the Government estimate is excessive and based on items outside the scope of the RFP; thus, the awardee's contract price must be excessive and the Army's assessment of the advantages of the awardee's proposal must be distorted.



Our review of the record reveals that a primary basis for the Army's selection of the awardee over the protester was the Army's assessment that the protester's proposed staffing plan was weak both in numbers and quality. In that regard, the Army noted that the protester's staffing plan did not adequately address projected growth in population and facilities and did not meet the inadequate level of staffing of the current contractor. We note that the higher number of staff personnel necessarily increases the need for housing and transportation of personnel and increases the use of medical supplies, as reflected in the Government estimate. In discussions, according to the record, the Army advised the protester, in detail, that its proposed staffing level was inadequate, but the protester did not satisfactorily improve its proposal in this area.

We conclude that the Army's disclosed staffing requirement--detailed by the RFP's requirement for staffing and operation of the existing, 100-bed hospital and new 30-bed wing and thoroughly communicated to the protester by the Army during discussions--was within the RFP's scope of work, was a proper basis for the Government's cost estimate, and was a proper element to be used in evaluating the reasonableness of proposed prices. In sum, the protester had a fair opportunity to propose the best staff (in terms of numbers and quality) that it could. Based on the record, the protester submitted its best and final offer with knowledge of the Army's evaluated weaknesses in the protester's proposed staff, but the protester did not significantly improve its proposal. Thus, this aspect of the protest is without merit.

Fifth, the protester contends that the Army generally had a predisposed and preferential attitude detrimental to the interests of the protester. The protester asserts that the Army's attitude prohibited fair evaluation of the protester's proposal. In support, the protester submits the following: (1) scores from the evaluation of initial proposals revealed that the protester's score (66.31), including cost, was higher than the awardee's (64.08), but, after discussions with the protester, one evaluator extensively criticized the protester's proposal; (2) the protester points to a memo dated May 18, 1981, referring to the Army's experience with the protester on a prior



contract (the protester asserts this experience is referred to in a "negative fashion"); (3) the protester points to an Army letter dated March 31, 1979, regarding a prior procurement, indicating that satisfactory information on the protester's experience in the health services area was not available; (4) two evaluators monitored the protester's performance on a prior contract, but these evaluators may not have medical service experience or qualifications, possibly making their evaluation both subjective and uninformed; and (5) the small difference between the Government estimate and the awardee's proposed price is surprising.

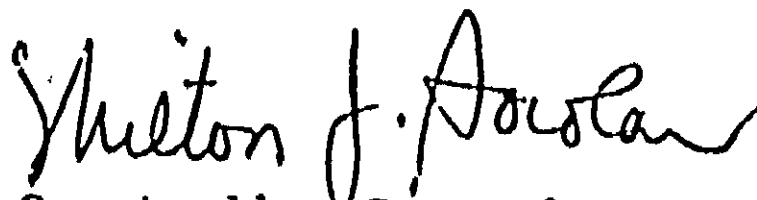
In our view, the matters raised by the protester fall far short of convincing evidence that the Army acted improperly regarding the protester. The initial proposal scores seem to indicate that there was no action in connection with the evaluation of proposals which prejudiced the protester. Further, it is not uncommon for evaluators' views to change after discussions and consideration of best and final offers. The May 18, 1981, memo appears only to point to a general problem of providing adequate information to firms which may not be familiar with the Army's procedures. The record contains no suggestion that the March 31, 1979, letter specifically influenced the evaluation of the protester's proposal in this procurement. Moreover, we have no basis to question the competence of the two evaluators mentioned by the protester because there is no showing that the evaluation was incorrect. See CompuScan, Inc., 58 Comp. Gen. 440 (1979), 79-1 CPD 288. Finally, the small difference in quantum between the Government estimate and the awardee's proposed price is not proof that something improper happened here. In our view, the fact that the awardee's final price was higher than its initial price reasonably could have resulted from proper and comprehensive discussions between the Army and the awardee (similar to those held between the protester and the Army) and related changes contained in the awardee's best and final offer. Thus, this aspect of the protest is without merit.

Finally, the protester complains about the length of time it took for the Army to respond to the protest. In reply, the Army attributes the delay as primarily resulting from "severe manpower problems." In any event, since the protest is without merit, the delay was not prejudicial.

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We deny the protest and the related claim for bid preparation expenses.

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Comptroller General  
of the United States